TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 171.

LA FAYETTE B. EATON, APPELLANT AND PLAINTIFF IN ERROR,

vs.

HARRISON H. BROWN AND IRA DORRANCE.

APPEAL FROM AND IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 17, 1903.

(18,754.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 2, 1903.

ident of the city of Washington in the District of Columbia, departed this life in the last-named city and District on or about the 17th day of December, 1901, the said decedent having been an employé of the United States Treasury Department from April 14, 1883, to the time of her death, being at the time of her death over 70 years of age.

3. The said Caroline Holley, during the last two or three years of her life, often spoke of its being her intention to leave whatever property she was possessed of at the time of her death to the petitioner, Lafayette B. Eaton, and to the Methodist church at her old home in Bloomingburgh, New York, from which church she never removed her membership, and from which church, by the way, her body, removed from Washington, was taken for interment in the cemetery hard by.

And the said decedent, during the last two or three months of her life often spoke of having made her will, saying that the will was among her papers and that it showed how she wanted her property to go.

4. The only paper in the nature of a last will and testament left by the said decedent, as disclosed by diligent search among her papers, is the one in her own handwriting, bearing date the 31st day of August, 1901, and now on file in the office of the register of wills of the District of Columbia. In the said paper-writing which was left by the said decedent as her last will and testament, no person is named as executor, but the petitioner herein is named as the sole residuary legatee.

5. The said decedent left surviving her the following persons, all adults, who constitute her heirs-at-law and next of kin, their names, residences, and relationship to the decedent being as follows:

Name.	Relationship.	Residence.
Harrison H. Brown	Cousin	Winterton, N. Y.
Ira Dorrance	"	Middletown, N. Y.
Winthrop Dorrance	"	" " "
James L. Beyea	"	217 2d Ave., N. Y.
Archibald A. Beyea	"	Harrison, N. Y.
Phœbe Beyea	"	" " "
Henry Beyea	"	Dunmore, Pa.
John Wilkin	"	Crystal Run, N. Y.
Susan Pierson	"	217 2d Ave., N. Y.
Mary Ann Millspaugh	"	Sulphur Springs, Ark.

6. The said decedent left personal property of the value of about $5500, the same consisting of cash in bank (about $1,000), promissory notes (secured to the extent of $2500), and four $1,000 railroad bonds of the value of about $2,000. And the decedent left no debts payable from her estate except the expenses of her last illness and burial.

3 The petitioner is informed and believes that the said decedent was entitled at the time of her death to an interest in some land in the city of Washington, in the District of Columbia, now standing in the name of Octave B. Van Wycke, the exact location, description and value of which the petitioner is unable to state, although he is informed that the said land is worth about $1,500.

7. The petitioner further says that he is informed and believes that this honorable court has jurisdiction to take the proof of said last will and testament of the said Caroline Holley, deceased, and the power of granting letters of administration *cum testamento annexo* and he is desirous that such proof be taken and such letters granted.

Wherefore the petitioner prays:

1. That a citation may issue out of this honorable court directed to the proper persons, requiring them and each of them to appear and attend the probate of said last will and testament.

2. That the said last will and testament may be admitted to probate and record as a will of personal property.

3. That letters of administration *cum testamento annexo* may be issued to the petitioner upon his giving bond in such sum as may be fixed by this honorable court.

4. That such other and further relief may be had as the nature of the case shall require and to the court shall seem fit.

LA FAYETTE B. EATON.

JOS. A. BURKART,
J. ALTHEUS JOHNSON,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof, and that the matters and things therein stated upon my personal knowledge are true, and that those stated upon information and belief I believe to be true.

LA FAYETTE B. EATON.

Subscribed and sworn to before me this 6th day of February, 1902.

[SEAL.] S. OLIVIA MOORE,
Notary Public, D. C.

Leave to file this amended petition is hereby granted, a copy of the petition, as thus amended, to be served on each of the parties, or his attorney of record, who has appeared in these proceedings to object to the probate and record of the paper-writing herein propounded as the last will and testament of Caroline Holley, deceased.

Feb'y 10, 1902.

JOB BARNARD, *Justice.*

(Endorsement: Amended petition of Lafayette B. Eaton, Filed Feb. 10, 1902, Louis A. Dent, register of wills, clerk of probate court, D. C.)

4 In the Supreme Court of the District of Columbia.

In re Estate of CAROLINE HOLLEY, Deceased. No. 10544.

The petition of Ira Dorrance respectfully represents,

First. That he is a resident of the United States and a resident of the State of New York.

Second. That a citation has been served upon said Ira Dorrance dated the 26th day of December 1901 requiring him to attend the probate of the will of Caroline Holley above named.

Third. He now shows that he is one of the heirs-at-law of said Caroline Holley and his interest will be injuriously affected by the allowance of said pretended last will and testament to be admitted to probate by this honorable court; wherefore he prays leave to file this his caveat against said will and ask- that he may be heard thereon before any further or other order is made in the premises.

Fourth. And for grounds of objection against said pretended will he avers and shows that in his belief (1) the said paper-writing is not the last will and testament of said deceased, (2) that said Caroline Holley was not at the time of her death or at any time a resident of the city of Washington, in the District of Columbia. (3.) That the instrument here propounded as the last will of Caroline Holley is conditioned for its validity upon the happening of an event which did not take place. (4.) That as Caroline Holley deceased went on the journey referred to in the instrument here offered for probate on or about August 31st, 1901 and afterwards returned to the city of Washington, in which said city she died in or during the month of December 1901 the instrument here propounded is not her will. (5.) That the said alleged will of said Caroline Holley is not her free act and deed but was executed under the influence of the importunities suggestions and persuasions of one La Fayette B. Eaton, or some other person or persons and is not the voluntary act of said deceased Caroline Holley. (6.) That the alleged instrument purporting to be the will of said Caroline Holley was procured by fraud, misrepresentation and artifice by one La Fayette B. Eaton or some other person or persons. (7.) The said paper-writing is not in accordance with the terms of the statute in such case made and provided. (8.) The said paper-writing is not in accordance with law.

Wherefore your petitioner prays;

That the said paper-writing may be refused probate.

That issues may be framed between these caveatees and contestant and the proponents of the alleged will and tried by a jury in order to determine the allegations of fact bearing upon the validity of said will.

That the court may grant such other and further relief as the nature of the case may require.

IRA DORRANCE.

5 STATE OF NEW YORK, } ss:
County of Orange, }

I, Ira Dorrance, do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof, and that the facts therein stated of my personal knowledge are true, and that those stated upon information and belief, I believe to be true.

IRA DORRANCE.

Subscribed and sworn to before me this 3rd day of February, 1902.

WILLIAM J. BURKE,
Notary Public.

STATE OF NEW YORK, } ss:
Orange County Clerk's Office, }

I, William G. Taggart, clerk of said county, and the county court of said county (a court of record), do hereby certify that William J. Burke whose name is subscribed to the annexed affidavit [SEAL.] was, at the time of taking the same, a notary public in and for said county, duly commissioned and sworn and having full power to take the same; and further, that I am well acquainted with the handwriting of said notary, and verily believe that the signature subscribed to the said affidavit is genuine.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of said court and county, this 3rd day of Feb'y 1902.

W. G. TAGGART, *Clerk.*

(Endorsement: Caveat. Filed Feb. 4th, 1902. Louis A. Dent, register of wills, D. C., clerk of probate court.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of CAROLINE HOLLY, Deceased. Probate No. 10544, Doc. 29.

Harrison H. Brown, one of the next of kin of Caroline Holly, deceased, answering the amended petition of Lafayette B. Eaton, duly filed herein, shows to the court as follows:

First. Denies each and every allegation in said amended petition contained, except as hereinafter specifically admitted.

Second. Has no knowledge or information as to the amount or value of the estate left by the said Caroline Holly, and therefore de-

nies that there is no other property than that referred to in paragraph 6 of said amended petition.

Third. Admits that the said Caroline Holly at the time of her death had an interest in lands in the city of Washington, but has no knowledge of the amount or value of the same.

Fourth. Denies paragraph 7 of said amended petition, and
6 avers that the residence of the said Caroline Holly was at all times in Bloomingburgh, Sullivan county in the State of New York.

Fifth. Avers that after making the paper-writing referred to in paragraph 4 of said amended petition the said Caroline Holly returned to the city of Washington, and that therefore the said paper-writing purporting to be the last will and testament of said Caroline Holly became null and void and has no legal existence.

Wherefore, the said Harrison H. Brown prays that the amended petition of said Lafayette B. Eaton be denied, with costs, and for such other and further relief in the premises as to this court may seem just and equitable.

H. H. BROWN.

STATE OF NEW YORK, } ss:
County of Orange, }

I, Harrison H. Brown, do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof, and that the facts therein stated of my personal knowledge are true, and that those stated upon information and belief, I believe to be true.

H. H. BROWN.

Subscribed and sworn to before me this 22" day of March, 1902.

GEORGE W. COLLARD,
[SEAL.] *Notary Public.*

(Endorsement: Answer of H. H. Brown to amended petition, Filed Apr. 15, 1902, Louis A. Dent, register of wills, D. C. clerk of probate court.)

In the Supreme Court of the District of Columbia.

In re Estate of CAROLINE HOLLEY, Deceased. Administration No. —.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that for the purposes of the hearing in the probate court, to be held April 25, 1902, on the petition of L. B. Eaton to admit a certain paper-writing to probate as the last will and testament of Caroline Holley, and for no other purpose, as follows:

1. That the paper-writing filed as said will is in the handwriting of the deceased, and that it was signed by her on the 31st day of August, 1901.

2. On the first day of September she took a journey to the Buffalo exposition, through Canada, back through the Adirondacks, and then to Washington, D. C., where she resumed her occupation as clerk in the Treasury Department, and died December 17, 1901, at Washington, D. C.

R. F. DOWNING,
Attorney for Contestants.

7 The above statement of facts is admitted to be correct, though there are also other material facts in the view of the proponent of the paper.

J. ALTHEUS JOHNSON,
Of Counsel for Eaton, the Proponent.

April 25, '02.

(Endorsement: Stipulation of counsel, Filed Apr. 5, 1902, Louis A. Dent, register of wills, D. C. clerk of probate court.)

In the Supreme Court of the District of Columbia.

In re Estate of CAROLINE HOLLEY, Deceased. Administration No. 10544.

This cause coming on to be heard on the petition and amended petition of Lafayette B. Eaton, the caveat thereto, the answer to said amended petition by Harrison H. Brown, one of the next of kin of the said Caroline Holley, the stipulation of counsel filed in said cause, and the other papers, and the case having been argued by counsel on both sides, and submitted to the court, it is this 21st day of May, 1902, adjudged, ordered and decreed that the paper-writing propounded as the last will and testament of Caroline Holley be, and the same is hereby, refused probate and record, and the petition of Lafayette B. Eaton is hereby dismissed with costs.

And from this decree the petitioner, Lafayette B. Eaton, the proponent of the said paper-writing, and representing the interests involved in said paper-writing, in open court prays an appeal to the Court of Appeals of the District of Columbia, and said appeal is allowed, and the appeal bond to cover costs is fixed at one hundred dollars.

JOB BARNARD, *Justice.*

(Endorsement: Order refusing probate and record to paper-writing propounded by Lafayette B. Eaton as last will and testament, and dismissing petition. Filed, May 21, 1902, Louis A. Dent, register of wills, D. C. clerk of probate court.)

In the Supreme Court of the D. C., Special Term for Orphans' Ct. Business.

In re the Estate of CAROLINE HOLLEY, Dec'd. No. 10544, Doc. 29.

The register will make the transcript of the record in this case for the Court of Appeals, D. C., to which an appeal has been taken, putting into the transcript the following matter, namely;—

The amended petition, the will, the caveat, the answer to the amended petition, the stipulation of counsel and the decree refusing probate of the will.

J. ALTHEUS JOHNSON,
Of Counsel for Proponent of Will.

8 I agree to the above order.

R. F. DOWNING,
Attorney for Contestants.

(Endorsement: Order for transcript for Court of Appeals, D. C. Filed May 21, 1902, Louis A. Dent, register of wills, D. C. clerk of probate court.)

Form No. 93.

DISTRICT OF COLUMBIA, *To wit:*

Supreme Court of the District of Columbia, Holding a Probate Court.

I, John R. Rouzer, deputy register of wills for the District of Columbia, clerk of the probate court, do hereby certify the foregoing pages, numbered from 1 to 14, inclusive, to be true copies of the originals of certain papers on file in the office of the register of wills, clerk of the probate court, in case No. 10,544, estate of Caroline Holley, deceased, wherein Lafayette B. Eaton, — appellant, and Harrison H. Brown, appellee, the same constituting a full, true, and correct transcript of record of proceedings had in said cause according to the stipulation of counsel filed therein and made a part hereof.

I further certify, that the bond for appeal, in the penalty of one hundred dollars, was duly filed by said appellant, and approved by said court on the 22nd day of May, A. D. 1902.

In testimony whereof I hereunto subscribe my name and affix the seal of the said probate court this 28th day of May, A. D. 1902.

{ Seal Supreme Court of the District of Columbia, Probate Jurisdiction. }

JOHN R. ROUZER,
Deputy Register of Wills for the District of Columbia,
Clerk of the Probate Court.

Endorsed on cover: District of Columbia supreme court. No. 1225. La Fayette B. Eaton appellant vs. Harrison H. Brown *et al.* Court of Appeals, District of Columbia. Filed Jun- 9 1902 Robert Willett, clerk.

9 TUESDAY, *October* 14*th*, *A. D.* 1902.

LA FAYETTE B. EATON, Appellant,
vs.
HARRISON H. BROWN and IRA DORRANCE. } No. 1225.

The argument in the above entitled cause was commenced by Mr. J. Altheus Johnson attorney for the appellant, and was continued by Mr. Rossa F. Downing attorney for the appellees, and was concluded by Mr. Joseph A. Burkart attorney for the appellant. Counsel on both sides allowed to file additional briefs.

10 LA FAYETTE B. EATON, Appellant,
vs.
HARRISON H. BROWN and IRA DORRANCE. } No. 1225.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

This is an appeal from an order of the supreme court of the District of Columbia sitting in special term for orphans' court business, whereby probate was refused to a paper writing of a testamentary nature and costs were awarded against the proponent thereof.

The facts of the case, as they appear from the record, are these. One Caroline Holley, formerly a resident of Bloomingburgh, in the State of New York, but since the year 1883 a resident of the District of Columbia and employed here in the Treasury Department of the United States, died in this city on or about the 17th day of December, A. D. 1901, being then about the age of 70 years. After her death there was found among her papers a document of a testamentary nature, wholly in her own handwriting, and bearing date on August 31, 1901, and which in her own peculiar terms and somewhat incorrect spelling and language is as follows:

"WASHINGTON, D. C., *Aug.* 31*st*, /001

"I am going on a Journey and may not ever return. And if I do not, this is my last request. The Mortgage on the King House, which is in the possession of Mr H H Brown to go to the Methodist Church at Bloomingburgh. All the rest of My properday both real and personal to My adopted Son L. B. Eaton of the life Saving Service, Treasury Department Washington D. C. All I have is my one hard earnings and and I propose to leave it to whome I please.

(Signed) CAROLINE HOLLEY."

It appears that on September 1, A. D. 1901, the said Caroline Holley took a journey to the Buffalo exposition, which is presumed to be the journey referred to in the paper; that she went through Canada, came back through the Adirondacks, and then returned to

Washington, where she resumed her occupation as a clerk in the Treasury Department, and died in this city, as already stated, on December 17, 1901.

There was no executor named in the alleged will; and L. B. Eaton, the appellant and the residuary legatee and devisee named therein, thereupon filed the paper in the office of the register of wills for this District, and also filed a petition for its admission to probate as a will merely of personal property, it being apparent that in the absence of attesting witnesses it could not be sustained as a will of real estate. In the appellant's petition it is averred that the decedent left personal property of the value of about $5,500, and an indefinite interest in some land in this city; that there was no other paper of a testamentary nature found among her effects; and that, during the last two or three months of her life, she often spoke of having made her will, that it was among her papers, and that it showed how she wanted her property to go. It is alleged further that she had repeatedly stated during the last two or three years of her life that it was her intention to leave whatever property she possessed at the time of her death to the petitioner La Fayette B. Eaton and the Methodist church at Bloomingburgh, in the State of New York, where, it is alleged, her body, after her death, was taken for burial.

The next of kin of the deceased appear to have been some cousins. Ten of them are mentioned in the appellant's petition to whom citations were issued. Two of these, the appellees here, filed caveats to the probate of the alleged will. Besides the usual grounds of fraud, undue influence, misrepresentation, and irregularity in the execution of the alleged will, and the further ground that Caroline Holley was not at the time of her death or at any time a resident of the District of Columbia, it was objected by the caveators that, as the alleged will was conditioned for its validity upon the happening of an event which never took place, namely, her failure to return from her then projected journey, the paper never went into effect as a will. There is no opinion of the learned justice who heard the cause in the court below to be found in the record before us; but it seems to be conceded on both sides that his decision was based on this last-mentioned objection, which he sustained. The decree rendered by him recites that the cause was heard "on the petition and amended petition of La Fayette B. Eaton, the caveat thereto (presumably meaning the caveat to the alleged will), the answer to said amended petition by Harrison H. Brown, one of the next of kin of said Caroline Holley, the stipulation of counsel filed in said cause (which was to the effect that the paper writing in question was in the handwriting of the deceased, and that it had been signed by her on August 31, 1901, and that on the 1st of September, 1901, she had gone on the journey mentioned, and had thereafter returned to Washington and resumed her usual occupation, dying there, as stated, on December 17, 1901) and the other papers (which however do not appear in the record before us); and it refused probate and

record to the paper writing in question, and dismissed the petition, with costs."

11 From this decree or decretal order the petitioner La Fayette B. Eaton has appealed.

The assignments of error are three in number:

(1.) That it was error to hold the words in the paper concerning a journey as constituting a condition precedent to the operation of the writing of a will, instead of being merely an expression of the inducement for making the will.

(2.) In holding that no testimony was admissible to show that these words did not constitute a condition, and that the paper was of a testamentary character.

(3.) That it was error to adjudge costs against the petitioner Eaton individually.

1. The second of these assignments of error we must dispose of summarily with the statement that there is nothing in the record before us to show that the question of the admission of testimony to qualify or explain the paper was raised in the court below or was decided by it. There is no offer in the record to adduce such testimony. The only reference which we find to anything of the kind is the statement contained in the amended petition to the effect that, during the last two or three months of her life, the deceased had often spoken of having made her will, and that it was among her papers; and that, during the last two or three years of her life, she had often spoken of its being her intention to leave her property to the appellant Eaton and to the Methodist church at Bloomingburgh. But these allegations are all denied by the answer; and, as we have said, there was no offer of proof to sustain them. Moreover, it is not apparent to us how, in the face of the elementary rule of evidence that oral testimony is not admissible to vary or contradict the terms of a written instrument, any such statements as are here indicated could be received to explain away and to nullify the express language of the paper writing before the court.

2. The first assignment of error brings up for review the only substantial question in the case—whether the paper writing in question became a nullity by reason of the failure of the apparent condition upon which it was to become effective; or whether what appears to be a condition was in fact and in legal intendment only the expression of the inducement operating upon the mind of the writer to make the alleged will. And this question we think was rightly determined by the court below by the decree which it made.

Undoubtedly unless we are prepared to repudiate the overwhelming weight of authority and to hold that there can be no such thing as a conditional will, that is, an instrument of writing limited to go into effect as a testamentary disposition of property only upon the happening of some specified contingency, and not otherwise, the document in this case purporting to be the will of the deceased Caroline Holley can not be sustained as now valid and operative. If the words used in it as a preamble do not constitute a condition upon which the document is to become effective, we find it impossi-

ble to say what words could have been used for the purpose. The statement is that, if she does not return from the journey on which she was then about to enter, the paper writing was then to be taken as her last request; that is, as her last will and testament. The converse of the proposition is, that, if she did return, then it was not to be her last will and testament. Language could not well be plainer than this. And as she did return, it is very clear that the paper thereafter ceased to have any effect as a testamentary disposition of her estate.

It is open to us, of course, to speculate that she did not mean this, but something directly the reverse of it. But wills can not be established upon mere speculation that parties did not mean what they said. It is difficult to see why such conditions should be inserted in papers of a testamentary character, when the same result could be had by the execution of another will upon the determination of the specified contingency, or by the destruction or cancelation of the paper. But it is idle to speculate on the actuating motives of parties in their testamentary dispositions. Nowhere, perhaps, are the vagaries of human nature more distinctly evidenced than in the matter and the manner of wills and testaments, especially when these documents are written by the parties themselves, or by persons ignorant of the law. It is often difficult to determine what they mean, or to deduce a coherent and rational purpose from them. But the difficulty would be increased a thousand fold, if courts allowed themselves to go outside of the written instruments, opened the door to oral testimony, and established wills upon speculation as to what was the real intention of the parties irrespective of the written document. No doubt that real intention is sometimes frustrated by the application of this rule of construction. But it was said long ago in this connection—*voluit, sed non dixit*—he may have so intended, but he has not said so—and we are bound by the writing.

The conclusion reached by the court below is sanctioned by the apparently unanimous current of legal authority in England, and by the great preponderance of decision in America. With great industry, learning and ingenuity the principal cases on the subject have been cited and considered in the brief filed on behalf of the appellees in this case. Among them are Parsons *v.* Lanoe, 1 Ves. Sr. 190; Sinclair *v.* Hone, 6 Ves. Jr. 607; *In re* Winn, 2 Perry and Davison, 47; Roberts *v.* Roberts, 8 Jur. (N. S.) 220; *In re* John Porter, L. R. 2 Perry and Davison, 22; *In re* Robinson, L. R. 2 Perry and Davison, 171; Lindsay *v.* Lindsay, L. R. 2 Perry and Davison, 449; *In re* Ward, 4 Haggard, 176; *In re* Todd, 2 Watts and Sergeant (Pa.) 145; Morrow's Appeal, 116 Pa. 440; Wagner *v.* McDonald, 2 Harris and J. 346; Maxwell *v.* Maxwell, 3 Met. (Ky.) 101; Dougherty *v.* Dougherty, 4 Met. (Ky.) 25; Robnett *v.* Ashlock, 49 Mo. 171; Magee *v.* McNeill, 41 Miss. 17. See, also Jarman on Wills, vol. I, p. 17; and Schouler on Wills, p. 285.

In the leading case of Parsons *v.* Lanoe, 1 Vesey, Sr. 190, before Lord Chancellor Hardwicke, the words used were almost identical

in their import with those used in the present case. They were: "*In case* I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland, my will and desire is, etc., etc." It appeared also in that case, somewhat similar to the
12 present, that the testator in his last illness had told some of the persons around him that his will would be found in a certain designated place, where the paper offered for probate was subsequently found, and that he had frequently alluded to it as his will. He returned from Ireland, and died some time afterwards. Lord Hardwicke, in disposing of the case, said:

"I am of opinion that the disposition is a contingent provision, and I think no part was intended to take effect, except he died before his return."

And he held also that oral testimony was not admissible to explain or vary the words of the writing.

In the case *In re* John Porter, L. R. 2 P. & D. 22, where the words used were: "Should anything unfortunately happen to me while abroad, etc., etc.," and which were held to make the will conditional, the distinction was pointed out between words of condition and words which simply express the reason and the occasion for making the will; and it was stated that, if by any reasonable interpretation, the language can be construed as referring to the apprehended occurrence as merely the reason for making the will, it should be so construed, and the will should not be regarded as conditional. And the current of modern authority, as claimed on behalf of the appellant, is strongly in favor of this proposition. In pursuance of this view the cases were decided of Bradford *v.* Bradford, Likefield *v.* Likefield, 82 Ky. 595; French *v.* French, 14 W. Va. 459; *In re* George Thorne, 4 Swabey and Tristram, 36; *In re* Dobson, 1 Perry & D. 88; *In re* Lindsay, 2 Bradf. (N. Y.) 204; Thompson *v.* Connor, 3 Bradf. (N. Y.) 366; Skipwith *v.* Cabell, 19 Grattan, 758; Cody *v.* Conly, 27 Grattan, 313. Of these probably the cases of Likefield *v.* Likefield and French *v.* French are the strongest in support of the appellant's contention.

In the case of Likefield *v.* Likefield the court of appeals of the State of Kentucky had before it a testamentary paper, which was in these words:

"If any accident should happen to me that I die from home, my wife Julia Ann Likefield shall have everything I possess, the house and lots and money that is due to me, and for her to hold it as her own."

And it held: "The rule is that courts will not incline to regard a will as conditional if it can reasonably be held that the maker was simply expressing his inducement to make it, however inaccurate the language may be for that purpose, if strictly construed; and unless the words clearly show that it was intended to be temporary or contingent, it will be upheld. * * * While the word *if* is an apt one to express a condition, yet the language used is so general in character that it shows that the testator intended it as words of *inducement* to the making of the will only, and not that the disposi-

tion of his property should depend merely upon the place of his death."

In the case of French *v.* French the words used by the testator were: "Let all men know hereby, that if I get drowned this morning, March 7, 1872, I bequeath all my property, personal and real, to my beloved wife, Florence." He was about to go on a journey on the day mentioned, which required the fording of a swollen stream near his place of residence, and from which his wife tried to dissuade him. He accomplished the journey in safety, and did not die until nearly three years afterwards. The writing specified was then presented for probate as his will; and the court of appeals of the State of West Virginia said in regard to it:

"It seems that it is now an established principle that, while a person may make a conditional will, his intention to do so must appear clearly. The question is, whether the contingency is referred to as the reason or the occasion for making the disposition, or as the condition upon which the disposition is to become operative."

And further on it said: "The language can be reasonably interpreted and construed to mean that he refers to the calamity and the time during which it may happen as the reason for making said paper writing, and not as the condition upon which the disposition of the property is to become operative; and the will should be interpreted as though it read,—'Lest I get drowned this morning; or lest I die this morning.'"

These cases have not received unqualified approval. The cases of French *v.* French, *In re* Dobson, and *In re* Martin were cited by the court of appeals of Maryland in the case of Kelleher *v.* Kernan, 60 Md. 440, 446, 447, where it was said of them: "Without committing ourselves to full approval of these several decisions under their respective circumstances and language employed, we refer to them as vastly stronger cases for holding the will contingent than this one, and where they were held not contingent." In the case of Kelleher *v.* Kernan it was significantly remarked that the paper writing there at issue "evidently embodied what the testator wanted *in any event* to be done with his property." The cases of Likefield *v.* Likefield and French *v.* French were cases in which the wills were made by husbands in favor of their wives, a disposition which they would probably have made of their respective estates in any event; and it is evident in both cases that the testator contemplated the propriety of making wills in view of the possible nearness of death, and did not intend the testamentary disposition to be specifically contingent upon the issue of the journeys upon which they were at the time about to enter.

In the case now before us there is no specific reference whatever to the matter of death, except by implication. Neither dying nor death is mentioned. The sole statement is that the testatrix might never return from the journey which she was about to undertake. It is quite consistent with her circumstances that if she did return, she might have made some other disposition of her estate. At all

events we find nothing in the words which she used which would remove them from the category of conditional limitations.

It may well be that in all such cases the parties had no actual intention to make their bequests and devises in the shape of conditional limitations; and that all such conditional limitations should be disregarded, or construed merely as statements of the inducement to the making of the wills at the time, if we would give effect
13 to the real intention of the testators. But, in view of the authorities on the subject, and in view of the danger of wandering beyond the letter of the will in order to seek the intention, we are constrained to hold that, in consequence of the words of the preamble and the failure of the contingency on which the testamentary paper in question was to become operative, that paper is now of no effect. And we think that the court below was right in so holding.

3. An assignment of error is based upon the adjudication of costs against the appellant. But it does not appear that the question was in any manner raised in the court below, as might well have been done. For this reason, and because the matter of costs is mainly in the discretion of the court below in proceedings in the probate court, although it may be noticed incidentally on appeal (Canter *v.* Insurance Co., 3 Pet., 307; United States *v.* The Malek Adhel, 2 How., 210; Tuohy *v.* Hanlon, 18 D. C. App., 225, 230, and cases there cited), we cannot assume that the decision was erroneous in this regard, when we find no other reason to disturb it. Nor would we have deemed it proper to disturb it, if the decision had been the other way, and the court had awarded the costs to be paid out of the estate.

We find no error in the decision of the probate court in the premises; and it follows, therefore, that the order appealed from should be affirmed, with costs.

And it is so ordered.

14 TUESDAY, *November 4th, A. D.* 1902.

LA FAYETTE B. EATON, Appellant.
vs.
HARRISON H. BROWN and IRA DORRANCE. } No. 1225. October Term, 1902.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the order of the said supreme court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

November 4, 1902.

15 WEDNESDAY, *November 5th, A. D.* 1902.

LA FAYETTE B. EATON, Appellant,
vs.
HARRISON H. BROWN and IRA DORRANCE. } No. 1225.

On motion of Mr. J. A. Johnson of counsel for the appellant, it is ordered by the court that an appeal and writ of error to remove this cause to the Supreme Court of the United States, be, and the same are hereby, allowed, and bond on said appeal and writ of error is hereby fixed at the sum of three hundred dollars: Bond to act as supersedeas is fixed at ten thousand dollars.

16 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between La Fayette B. Eaton, appellant, and Harrison H. Brown and Ira Dorrance, appellees a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of November, in the year of our Lord one thousand nine hundred and two.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

17 (*Bond on Appeal.*)

Know all men by these presents, that we, La Fayette B. Eaton, as principal, and the American Bonding and Trust Company of Baltimore as surety, are held and firmly bound unto Harrison H. Brown and Ira Dorrance in the full and just sum of three hun-

dred dollars, to be paid to the said Harrison H. Brown and Ira Dorrance, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixth day of November, in the year of our Lord one thousand nine hundred and two

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said court, between La-yette B. Eaton and the said Brown and Dorrance, to wit, the cause numbered 1225 on the docket of the said court, a decree was rendered against the said La Fayette B. Eaton and the said Eaton having sued out a writ of error and prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Harrison H. Brown and Ira Dorrance citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said La Fayette B. Eaton shall prosecute said writ of error and appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

L. B. EATON. [SEAL.]
LA FAYETTE B. EATON. [SEAL.]
AMERICAN BONDING COMPANY OF BALTIMORE, [SEAL.]
By THOS. J. DE LASHMUTT, [SEAL.]
Attorney-in-fact. [SEAL.]

[Seal of American Bonding Company of Baltimore.]

Sealed and delivered in presence of—

JOS. A. BURKART.

Approved by—

R. H. ALVEY,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] 1225. La Fayette B. Eaton, appellant *vs.* Harrison H. Brown and Ira Dorrance. Bond on writ of error and appeal to Supreme Court United States. Court of Appeals District of Columbia Filed Nov. 19, 1902 Robert Willett, clerk.

18 UNITED STATES OF AMERICA, *ss:*

To Harrison H. Brown and Ira Dorrance, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein La Fayette B. Eaton is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 19th day of November, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged this 20th day of Nov., 1902.

R. F. DOWNING,
Att'y for Appellees.

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov. 20, 1902. Robert Willett, clerk.

19 UNITED STATES OF AMERICA, *ss:*

To Harrison H. Brown and Ira Dorrance, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein La Fayette B. Eaton is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 19th day of November, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged this 20th day of Nov., 1902.

R. F. DOWNING,
Att'y for Defendants in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov. 20, 1902. Robert Willett, clerk.

20 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 19, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of La Fayette B. Eaton, appellant, *vs.* Harrison H. Brown and Ira Dorrance, No. 1225, October term, 1902, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 26 day of November, A. D. 1902.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18754. District of Columbia Court of Appeals. Term No. 171. Lafayette B. Eaton, appellant & plaintiff in error, *vs.* Harrison H. Brown and Ira Dorrance. Filed December 17, 1902. File No. 18754.

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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

LA FAYETTE B. EATON, Appellant and Plaintiff in Error,
v.
HARRISON H. BROWN *et al.*
} No. 171.

Brief in Behalf of Appellant and Plaintiff in Error.

STATEMENT OF THE CASE.

This case is here on writ of error (and appeal) from the Court of Appeals of the District of Columbia, that court having affirmed the action of the justice who, holding a special term of the Supreme Court of the District for probate business, refused to receive for probate and record the following holographic paper made by the late Caroline Holley as her last will and testament:

"WASHINGTON, D. C. Aug. 31—001.

"I am going on a Journey and may, not ever return. And if I do not, this is my last request. The Mortgage on the King House, wich is in the possession of Mr. H H Brown to go to the Methodist Church at Bloomingburg All the rest of My properday both real and personal to My adopted Son L. B. Eaton of the life Saving Service, Treasury Department - Washington D. C. All I have is my one hard earnings and and I propose to leave it to whome I please.

"CAROLINE HOLLEY."

Mrs. Holley, the decedent, was born in Bloomingburg, N. Y., and came to Washington with her husband, David L. Holley, who was appointed to a clerkship in the Treasury Department August 9, 1880, and who died June 3, 1882. The widow was appointed to a position in the Treasury Department April 14, 1883, and she remained an employe of the Treasury Department until her death, December 17, 1901.

Mrs. Holley, September 1, 1901, the day after she made the above writing, left Washington for a visit to the Buffalo Exposition and other places and returned to Washington September 20, 1901. She was on duty at her desk in the Treasury Department from September 20 to November 27. She left Washington again November 27 to attend the wedding, in New York City, of La Fayette B. Eaton, an event to which she had been looking forward with pleasurable anticipations for nearly a month. She returned to her desk at the Treasury Department December 7, where she remained on duty until December 10, when she was taken sick. She died December 17 at 1313 New York avenue N. W., being at the time over 70 years of age.

During the last two or three years of her life she often said she intended to leave whatever she had to the Methodist church at her old home at Bloomingburg, N. Y., and to La Fayette B. Eaton, a clerk in the Treasury Department, whom she always spoke of as her adopted son. She often said she was under no obligation for anything she had to any of her relatives or kinfolks. After her return from the trip to Buffalo she several times said she had made her will, referred to the will as among her papers, and said it showed how she wanted what she had to go when she died. The only paper of testamentary character found after her death was the one above mentioned—in her own handwriting—carefully preserved in her private and personal desk in her rooms at 1313 New York avenue, N. W. The paper thus preserved was propounded for probate in the Supreme Court

of the District of Columbia by La Fayette B. Eaton, the person named in the paper as the residuary legatee of the decedent; but objection was made to the probate of the paper by Harrison H. Brown and Ira Dorrance, two of the next of kin of the decedent.

Counsel for Brown and Dorrance, who opposed the probate of the paper, desired the judgment of the court on the question as to whether the simple return of Mrs. Holley from her journey into New York and Canada did not of itself, without reference to any other feature of the case, avoid and make null the paper which was offered for probate. They claimed that the paper was conditional on its face, and that the condition on which, as they claimed, it depended (to wit, the death of Mrs. Holley on the journey she was entering upon when see wrote it) having never happened, the paper was not entitled to record; and they wished this question, which, if determined in their favor, would be decisive of the case, to be submitted to the court for determination preliminary to any further proceeding in the matter. With a view, therefore, to ascertaining whether the paper, in consideration of the simple fact that Mrs. Holley returned from the journey she was about to make when she wrote it, was thereby disqualified for probate, they procured, for use in discussing that question, the stipulation which is found on pages 6 and 7 of the printed record. That stipulation made it possible for the court (and that is the purpose the stipulation was intended to serve) to render judgment refusing probate of the paper, if the court should think that the safe return from that journey destroyed the probative value of the paper and should also further think that the paper, in the face of such return, would not be affected, in meaning and legal effect, by proof of the facts alleged in the petition which proposed the paper for probate—such facts, for instance, as those alleged in paragraph 3 of the petition (Rec., p. 2), namely:

"The said Caroline Holley, during the last two or three years of her life, often spoke of its being her intention to leave whatever property she was possessed of at the time of her death to the petitioner, La Fayette B. Eaton, and to the Methodist Church at her old home in Bloomingburg, New York. * *

"And the said decedent, during the last two or three months of her life, often spoke of having made her will, saying that the will was among her papers and that it showed how she wanted her property to go."

All the facts averred in the petition must, of course, be taken as true, and held to be inadmissible to affect the result, before the court is at liberty to refuse probate of the paper, regard being had to the above-mentioned stipulation, and the purpose it was intended to serve, namely, to ascertain whether proof of the paper as a "last request" is admissible despite the fact that the journey referred to in the paper was accomplished in safety.

To state the question presented by the record, in the light of the stipulation, Do the words on the face of the paper constitute a condition (Mrs. Holley having made the journey to Buffalo and returned) which avoids and makes null the paper, no matter what the surrounding facts and circumstances, and no matter what the intention of the decedent as touching said paper may have been, even as declared by herself? Is the construction put by the old lady upon her own piece of testamentary writing, and the place and manner in which she preserved it, to have no effect in the interpretation of it? Is a court to look solely to the fact that a particular journey, anticipated at the writing of the paper, was safely made, and thereupon, shutting its eyes to every other fact, both antecedent and subsequent, declare the paper to be non-probative as the testamentary expression of the decedent?

Assignment of Errors.

The court erred in refusing probate to the above mentioned paper-writing—

First. Because it regarded the words used in the paper about a journey as constituting a "condition," whereas they show only the occasion, motive, or inducement which led to the making of the will at that particular time.

Second. Because it regarded that nothing could be allowed to be produced in the way of testimony (the journey having been safely made) which would give to the paper a testamentary character, or which would show that the words used in it did not constitute a "condition."

Third. Because it failed to regard that the paper, even if "conditional" in terms, would still, as a will of personal property, be subject to parol or implied revival or republication after the expiration of the "condition."

Fourth. The court, having reached the conclusion it did, erred also in imposing costs upon La Fayette B. Eaton, the proponent of the paper for probate. The costs involved in offering the paper for probate and record should not have been assessed upon Eaton personally, but upon the estate left by the maker of the paper.

Argument for the Appellant and Plaintiff in Error.

The original paper shows a degree of illiteracy in the writer. The punctuation is not always right; the capital letters are not always correctly used; the spelling is at fault in some of the words; the handwriting itself indicates a person to whom penmanship is rather laborious. The work of the decedent in the Treasury Department was that of a counter, and not that of a "clerk" in the ordinary sense of the term. These facts are mentioned to show how wide of the mark we may hit, if we judge of the writing of the decedent as we might if the writer were a skilled dialectitian,

accustomed to use language with full knowledge of the disputes and legal quibbling to which words and phrases may give rise.

The decedent, over 70 years of age, was without children, no relatives near her, her next of kin living in New York, Pennsylvania, and Arkansas, none of them of nearer relationship to her than cousin, and to none of them did she feel under obligation. As said in the paper, "All I have is my own hard earnings and I propose to leave it to whom I please."

The old lady cherished recollections of the church she had attended in years gone by in her childhood home, and she was fond of the young man in the Treasury Department whose life in her old age had touched hers and who, by his kindly attentions, had done so much to brighten and make pleasant her pathway. She speaks of him as her "adopted son."

The vital matter in a question like the one at bar is the intention of the testator. The question is not one which calls for the construction of words with a view to ascertaining what the rights of some third party may be (as, for instance, under a deed or contract) acquired with reference to the meaning of certain words. In such a case the question may very often and properly be, not so much what the writer intended by the words used, as what the words would import in the sense in which ordinarily used. In the case at bar, the decedent having the right of absolute disposition of her property, no one can or could claim an interest, vested or otherwise, contrary to her will. Whatever may be said about rules for the interpretation of language as between other parties, there is, as regards a testator, one leading and controlling rule, to wit, the intent of the testator, called by Chief Justice Marshall in Finley *vs.* King's Lessee, 3 Peters, 377, "the cardinal rule in the construction of wills."

Is the writing here offered for probate one which Mrs.

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Holley left as embodying her "last request," or is it a paper which she intended should be operative only on condition she did not return from her Buffalo trip? The courts are slow to regard a testator as having hung his will upon a condition unless his intention to do so is plainly and unequivocally manifest, as may be seen from some of the adjudicated cases. Notice, for instance, the conditional expressions "about to start upon a long journey" and "in case I do not return," used in Bradford *v.* Bradford, decided by the Kentucky Court of Appeals, May 19, 1883. The case is cited in Likefield *v.* Likefield, 82 Ky., 595, and is reported in 4 Ky. Law Reporter, 947. The prefatory words to the will were as follows:

"Being in the full possession of all my mental faculties but in feeble health, and *about to start upon a long journey*, and subject to the common casulties of others, I deem it prudent to provide for the disposition of my property *in case I should not return*," &c., &c.

The testator made the journey, returned home, and lived for several years thereafter. The Court of Appeals say, 4 Ky. Law Reporter, 948:

"It is contended that the words, 'in case I should not return,' rendered the instrument contingent, and, as he took the journey and returned without casualty, it is void and inoperative as a testamentary paper.

"Those words do not constitute a condition upon which the will is dependent. In connection with the other words quoted, they simply set forth the circumstances which induced him to make his will before his departure for fear he might never return. The supposed condition is alone connected with the motive and reasons for the prudence he deemed it his duty to exercise, and it is evident he did not intend to say, 'in the event I do not return, then I make the following disposition of my property or wish it disposed of in a particular mode,' but that he had doubts of his return,

which arose from his physical condition, the long journey he was about to take, and the casualties which so often occur to travelers, and for these reasons he absolutely disposed of the whole of his estate without any conditions whatever. Although he returned and lived several years afterwards he preserved the paper, and it was found after his death in his drawer amongst his private papers. This fact, while not amounting to a statutory republication, shows that the testator believed republication unnecessary and was satisfied he had disposed of his property, and did not look upon the paper as void because he had returned."

In Likefield *v.* Likefield, decided by the Kentucky Court of Appeals February 28, 1885 (82 Ky., 589), the piece of testamentary writing was the following:

"LOUISVILLE, *January* 14, 1859.

"If any accident should happen to me that I die from home, my wife, Julia Ann Likefield, shall have everything I possess, the house and lots and the money that is due to me, and for her to hold it as her own.

"WM. A. LIKEFIELD."

William A. Likefield did not die away from home, but died at home March 28, 1881, over 22 years after making the above writing. The Court of Appeals say, 82 Ky., 591:

"The rule is, that courts will not incline to regard a will as conditional if it can be reasonably held that the maker was simply expressing his inducement to make it, however inaccurate the language may be for that purpose, if strictly construed; and, unless the words clearly show that it was intended to be temporary or contingent, it will be upheld."

Again, page 592:

"The end to be assiduously sought is the *intention* of the testator, and all rules must be subordinated to it" (the intention of the testator).

And on page 594:

"It is quite natural for a person to give some reason for making a will, and, as has been well said, a 'close and literal interpretation may very easily carry us wide of the intention.'"

And on page 595:

"While the word *if* is an apt one to express a condition, yet the language used is so general in character that it shows the testator intended it as words of *inducement* to the making of the will only, and not that the disposition of his property should depend merely upon the place of his death."

Notice also the Court of Appeals of West Virginia in French *v.* French, 14 W. Va., 459. The piece of writing in that case was holographic, of the following tenor:

"Let all men know hereby, if I get drowned this morning, March 7, 1872, that I bequeath all my property, personal and real, to my beloved wife Florence.

"Witness my hand and seal, 7th of March, 1872.

"WM. T. FRENCH."

When French did the above writing his wife was trying to persuade him not to make that morning a trip which involved the fording of a swollen stream near his house. French was not drowned that morning, nor did he die until December 29, 1874, nearly three years afterwards.

The Court of appeals say, 14 W. Va., 499:

"It seems that it is now an established principle that, while a person may make a conditional will, his intention to do so must appear clearly.

"The question is, whether the contingency is referred to as the reason or occasion for making the disposition, or as the condition upon which the disposition is to become operative."

And on page 502:

"The language can be reasonably interpreted and construed to mean that he refers to the calamity, and the time during

which it may happen, as the reason for making said paper-writing, and not as the condition upon which the disposition of the property is to become operative; and the will should be interpreted as though it read, 'Lest I get drowned this morning; or lest I die this morning.'"

The following piece of writing is found *in re* George Thorne, as reported in 4 Swabey and Tristram, 36:

"CAPE COAST CASTLE, GOLD COAST,
"*2nd of November, 1863.*

"Be it known to all concerned: I request in the event of my death while serving in this horrid climate, or any accident happening to me, I leave and bequeath to my beloved wife, &c., &c.

"I consider that every person should be prepared for the worst, and particularly in such a treacherous climate as this, which is considered one of the worst in the world, which has compelled me to write this letter.

"GEORGE THORNE."

Thorne, who was a soldier, did not die on the Gold Coast, but in London, September 16, 1864. The court, concerning the instrument, says, page 38:

"I have read this paper over very carefully and I think it is not necessary to limit its operation to the event of death while on the Gold Coast."

And *in re* Dobson, Law Reports, 1 P. & D., 88, we have the following:—

"January 29, 1863. Thursday morning. In case of any fatal accident happening to me, being about to travel by railway, I hereby leave all my property to" &c., &c.

The writer of the above returned unhurt from the travel by railway, and died November 21, 1865. The court, in admitting the paper to probate, says, page 89:—

"The testator's meaning seems to me to have been this: 'My mind is drawn to the consideration that all railway traveling is attended with danger, and therefore I think I had better make my will.'"

In *ex parte* Lindsay, 2 Bradf. (N. Y.), 204, we have the case of a woman living in New York who on the eve of a trip to St. Louis wrote the following:

"SEPTEMBER 1, 1851.

"According to my present intention, should anything happen me before I reach my friends in St. Louis, I wish to make a correct disposal of the three hundred dollars now in the hands of Mr. Harrison, bearing interest for me. Of this I leave," &c., &c.

The woman made the trip without accident and returned to New York, where she died in December, 1851. Concerning the probate of the paper we quote from the opinion of the court as follows:

On page 206:

"The question necessary to be determined in this class of cases is, whether the words clearly express a contingency upon which the instrument is to take effect, or whether they may fairly be interpreted as indicating the cause or occasion of making the will."

And on page 209:

"The will is inartificially drawn; and, where language is employed without exactness or precision, close and literal interpretation may very easily carry us wide of the intention."

In Skipwith *v.* Cabell, 19 Grattan, 758, the testatrix, at the end of the second codicil, had written as follows:

"AUGUST 18, 1861.

"In case of a sudden and unexpected death, I give the remainder of my property to be equally divided between my

cousin, Dr. Carter, of Philadelphia, and my cousin, Peyton Skipwith, of New Orleans, one half of which each must hold in trust for the benefit of his children."

The testatrix did not die either suddenly or unexpectedly, and it was thereupon contended that the above bequests were conditional. The court expressed itself as follows, page 784:

"We can understand the language as designed only to express the reason which led the testatrix to dispose of the residue at that time, and to avoid the risk of further delay," adding, "The bequests were absolute and not conditional."

In Cody *vs.* Conly, 27 Grattan, 313, we have the following paper written by a man over in Fairfax County, Virginia, who, owing to the troublous times brought on by the presence of hostile troops, thought he would leave that section until the return of better times:

"LEWINSVILLE, *August* 19, 1862.

"DEAR WIFE: I am going away; I may never return. I leave my property to Gaines and Dan; dispose of it as you see fit; don't forget Sister Mary and Bridget. Pay William McCauley $20, Patrick Sullivan $25.

"EDMUND C. CONLY.

"Witness, SAMUEL FARNSWORTH."

But Conly never went away and continued to reside in Fairfax County until his death in 1868. It was contended that the above paper was conditional; and the court, on the subject of conditional wills, expressed itself as follows, pages 820–1:

"The cases on this subject show that while a person *may* certainly make a conditional will, his intention to do so must appear very clearly on the face of the will; and, if such an intention do not so appear, the will must be regarded as unconditional. Indeed, in some of the cases the form of ex-

pression was conditional, and yet the construction of the will was otherwise."

In Thompson *v.* Connor, 3 Bradf. (N. Y.), 366, the decedent left the following testamentary declaration:

"I give and bequeath to my cousin, Margaret Baxter, * * three hundred dollars, deposited by me in the Seamen's Bank for Savings, New York, August 31, 1849, the bank book, numbered 20,516, being in my hands, and whatever interest may accrue thereon, this gift and bequest being subject to the following condition, viz., that the said Margaret Baxter shall produce from the officers of the ship in which I shall sail on my next cruise satisfactory evidence of my decease during the same." * *

At the time the decedent executed the above paper, October 20, 1849, he was in contemplation of a voyage to sea from which he subsequently returned, and died in New York City in September, 1855. There was evidence of the recegnition of the will by the decedent shortly prior to his death; and the surrogate in decreeing probate of the paper said, page 368:

"Doubtless the possibility of death during the contemplated cruise was considered, and led to the incorporation of the condition in the will; but then the condition refers primarily to evidence, or, in other words, he does not give only upon condition he should die during that voyage, but that certain specified proof of his death should be produced. In this view we might read the condition as based entirely upon the contingency of decease upon a particular cruise, on the happening of which, the condition would become operative, and on the non-occurrence of which the condition would fall. The testator not having died on that cruise, there was no evidence required (from the officers of the ship), and that was an end of the condition. If the testator in this clause of the will is to be understood as saying, 'If I should die upon my next voyage then this will is made on condition that the legatee shall produce from the officers of the ship in which I

shall sail satisfactory evidence of my decease,' this would not make the will conditional. * * * To make a testament strictly depend upon a condition so as to affect the question of probate, the intention ought to be very clear that the will should *not* take effect except upon the prescribed contingency. The mere *factum* of the instrument implies generally an intention not to die intestate—a determination to give and bequeath—and if the condition is not annexed to the substance of the gift, but only to some collateral matter, such as payment on proof of death, then the gift will be absolute and not conditional, and the condition will be left to operate on the occurrence of the contingency contemplated by its terms. * * I think that the condition fell by reason of the event not happening to which it was attached, and that the gift was consequently unaffected."

Let us recur now to the piece of writing in the case at bar. The old lady (Mrs. Holley) tells the occasion which prompted her to write down her "last request" at the time she did. "I am going on a journey and may not ever return." She had often spoken of what her "last request" would be, but she had never written it down before, and now, on the eve of that journey, and its possibilities, she writes down what she calls "my last request." She was "*inops consilii*" at the time and had probably never in her life consulted a lawyer. She says: "I am going on a journey and may not ever return." These words do not bring us squarely to the point of death—the event which is before us when we say, "This is my last request." The old lady continues and alludes to death, the occurrence with reference to which she wishes to say, "this is my last request." And see how she does it. "And if I do not" return. To that hypothetic, not to say, euphemistic, mention of death, she appends her "last request." The request itself is absolute, not one word or syllable in it suggestive of a change in disposition, if written at another time or under other circumstances. The motive is set forth which induces her to write at the time she

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does, namely, the journey that is before her and the possible event that may happen in connection with it. Except for such possibilities, liable to happen at any time, there would be no occasion on the part of any one to make wills. Mrs. Holley, instead of referring to death in the abstract (as a legal draftsman might have done had she used one), refers to it in connection with a particular event just then before her—a journey full of uncertainty to her at her time of life; and the possibility of not returning from that journey comes over her and moves her to write down what, in the ordinary routine of her life, she had neglected to do theretofore, but which is now borne in upon her as she meditates on the eve of her long journey. What did she know of hypothetic or conditional phrases, and the possibilities that might lurk within them of conjuring up legal "conditions," to be made to appear as integral parts of her "last request," as she was then writing it down? Isn't her expression, the prefatory words, as she uses them, just a delicate euphemism such as we often hear from persons when they have occasion to refer to death? Instead of speaking plainly and pointedly, they say: "If I shouldn't be here," "If anything should happen to me." We are slow to put ourselves directly face to face with that dread event. We make sidewise and indirect allusions, enough to indicate the possibility, but hesitate to embrace the event in plain words. That the only uncertain or contingent thing in the mind of Mrs. Holley at the time she was writing this paper was whether or not she would die on that trip, is shown by the manner in which she preserved the paper and afterwards spoke of it. The contingency in her mind was the time of death, not the terms of her "last request." The fact that, before ever she had thought of going to the Buffalo Exposition, she had often expressed her purpose to leave what she had to the parties named in this paper, shows that the journey and the possibility that she might not return from it, was merely the cause of her writing

down her "last request" at the time she did, the same as though she had said: I make this my last request now, because I may not ever return from the journey I am now going upon.

A contingency, expressed with a view to the time of death, ought not, by any species of legerdemain in either grammatical or legal construction, be made to refer to the testamentary act itself. No higher evidence as to what Mrs. Holley meant by this paper could be adduced than her own words and conduct concerning it. In it she makes a conditional reference to death, but her subsequent recognition and preservation of the paper show that she had no thought of the condition as attached to the "request" itself.

Mr. Schouler very justly says in his work on Wills (Ed. 1900, Sec. 290, p. 297):

"It is held with good reason that the surrounding circumstances of the execution may be shown to aid in ascertaining the true interpretation of the will. Such proof may aid in determining, for instance, whether the testator merely had a particular peril or exposure in view, or, what is more improbable, meant that its effect should depend wholly upon death from that peril or exposure, and * we see no reason why the very circumstance that the will in question has never been cancelled, but is produced from proper custody on the testator's death and presented for probate, may not be adduced in favor of its intended validity. * For, after all, conditional wills are of so peculiar a description, and operate usually so disastrously, not to say senselessly, that any doubt should be resolved in favor of absolute character and a probate."

Again, the court below, in rejecting the paper offered for probate, disregarded the fact that a recognition of this paper by Mrs. Holley as her will after her return from the Buffalo Exposition could have the effect of reviving or republishing it as her will, even if it were a paper which had failed by reason of her return. Implied republications have always been permitted as to wills of personalty when there was

no statute prescribing a formal execution for such wills. The Statute of Frauds in England (29 Car. 11) made it necessary that republication of wills, as to land, be as express and formal as the original execution, of which the attestation of witnesses was an essential part; but wills of personal property continued capable of informal execution and hence of informal and implied republication; so informal, indeed, were such wills, as to execution, that, as said by Blackstone, they needed no witnesses, and not even the testator's own signature, if only the testator be shown to have written the will or caused it to be written; and such wills continued, as before, capable of informal republication. Indeed, a devise of land, prior to the Statute of Frauds, permitted of a parol revival; and such revivals or republications continued in England, as to wills of personalty, until 1837, when the Wills Act (1 Vict., ch. 26) prescribed the same formalities for wills of all kinds of property. The law, thus changed for England in 1837, remained in force in this District until January 1, 1902, when the Code become operative, under which, as in most of the States, the same formalities apply to all wills, whether they affect real or personal property.

That mere parol acts and declarations by a testator could reestablish and republish a will, as to personalty, under the Statute of Frauds, as it existed in England until 1837 and in this District until 1902, see the following cases, some of them showing such a republication as to land, anterior to the statute:

Miller *v.* Brown, 2 Haggard's Ecc. Rep., 209.
Braham *v.* Burchell, 3 Addams' Ecc. Rep., 243, 264.
Long *v.* Aldred, 3 Addams' Ecc. Rep., 48.
Brotherton *v.* Hellier, 2 Lee's Ecc. Cases, 55, 83–84.
Slade *v.* Friend, cited in Brotherton *v.* Hellier, 2 Lee's Ecc. Cases, page 84.
Beckford *v.* Parnecott, 2 Croke's Eliz., 493.

Cotton *v.* Cotton, Freeman's Reports, 264.
Anon., 2 Shower, 48.
Cotton *v.* Cotton, cited in Alford *v.* Earle, 2 Vernon, 209.
Bateman *v.* Pennington, 3 Moore's P. C. C., 223.
Strauss *v.* Schmidt, 3 Phill. Ecc. Rep., 209.

In Beckford *v.* Parnecott (2 Croke's Eliz., 493) the testator had devised "all his lands in Aldworth to Barbara and Joan, his daughters," and made them his executrixes. Subsequently to the making of that will he bought additional land in Aldworth. A person having offered to buy these additional lands, the testator said, "No, they shall go with my other lands in Aldworth, to my executrixes." Held a republication of the will so as to pass the after-acquired land.

In Cotton *v.* Cotton (Freeman's Rep., 264) the testator devised all his land to his wife, and, after the making of that will, purchased other land. To a party who desired to buy these newly-acquired lands, he said:

"No, for I have made my will and settled my estate and intend that my wife shall have my whole estate."

Held a republication so as to make the will embrace the subsequently-acquired land.

In a case reported anonymously in 2 Shower, 48, it is said:

"In a trial at the bar upon an issue directed out of chancery, concerning the republication of a will, it was resolved by all the courts that these words, 'My will in the hands of J. S. shall stand' amount to a republication."

In the case of Alford *v.* Earle, as reported in 2 Vernon, it is said on page 209:

"The case of Cotton *v.* Cotton cited, tried in the Common Pleas before Lord Chief Justice North, where the testa-

tor's saying his will was in a box in his study, amounted to a new publication."

In Brotherton *v.* Hellier (2 Lee's Ecc. Cases, 55, 83-84) the will when produced was found to be cancelled, but it was doubtful whether the cancellation had been made by the testator. However, the testator had given directions to his solicitor for the making of a codicil, which had been drawn by the solicitor and turned over to the testator for execution, but the testator, desiring to keep his wife, who watched him in his sick chamber, ignorant of what he was doing, died before he had signed the codicil. Held that the will was revived, even if the cancellation had been by the decedent.

In Slade *v.* Friend, cited at page 84 in Brotherton *v.* Hellier (2 Lee's Ecc. Cases) the will was in a trunk, of which the testatrix kept the key, and, being asked on her death bed whether she had made a dispositon of her affairs, she answered, "Yes," and pointed to the trunk. Held a revival of the will, though the will itself seemed to have been cancelled by having lines drawn over the testatrix's name.

In Miller *v.* Brown (2 Haggard, 209) the will, which purported to dispose of real and personal property, was made by a woman during coverture. Her husband died December 16, 1825; she died September 11, 1827. In June, 1827, she had delivered to one of the persons named as executor a tin box which she informed him contained her will (and in which the will was found after her death) and, in the evening of the same day on which she had so delivered the tin box, she had said to the father-in-law of the executor (Dr. Chichester) that 'she had that day deposited her will with him' (the son-in-law). The Court say, page 210:

"It has been said that it is necessary to show a republication after the husband's death, *animo republicandi*. It would be a strange doctrine for this court to hold that a formal republication is necessary for a will of personalty where no

publication is necessary. Custody is a sufficient publication of personalty. Dr. Chichester speaks to a very strong act of recognition, which, as far as concerns this court, is a sufficient republication. The deceased (within three months of her death) brought the will, sealed up and deposited in a tin box, which she delivered to one of her executors for safe custody, and so it remained till her death, and was then found.

"This is a republication to all intents and purposes, and the instrument so delivered becomes a new will. There cannot be the slightest doubt as to what her mind and intention were. She did not consider a formal republication necessary, but she adhered to the disposition.

"What effect this paper may have upon the real estate it is not for this court to determine, but it is clear that the executors are entitled to a general probate."

In Braham *v.* Burchell (3 Addams' Ecc. Rep., 243, 264) the testator (a woman) had died in August, 1817, leaving a will of date August 10, 1797. In March, 1784, she had married at Vienna, but had lived with her husband only a year, when she returned to England and resumed her maiden name. Her husband died in Ireland in 1805. Among the averments made in the paper propounding the will for probate was the following, page 244:

"That the deceased duly made and executed her last will and testament bearing date the 10th of August, 1797; that a few days before her death she, the deceased, recognized her said will, saying, that 'she had made her will and that it was to her satisfaction;' that shortly after her death the said will was found in her bureau, among other papers of moment and concern."

The recognition referred to in the allegation thus made was when the attending physician asked her (page 264) whether she had her matters arranged and she answered, "I have made my will." The physician then asked a second question, whether the will was to her satisfaction. She answered "Yes." But the above will was not present at

the time, nor described as to date or place of deposit. Indeed, the contestants of the above will claimed her words had reference to another will, but they did not show the existence of any other. The Court says, page 264:

"We all know that if a wife makes a will, being intestable at the time of the will making, still if, surviving, she approves and confirms (in a word, republishes) that will after the death of her husband, it is a good will. Now, that the deceased, if there be no other will in question, did approve and confirm (in effect, republish) this will, is indisputable. The mere conservation, for so many years, of this will, in connection with its place of deposit, may so evidence adherence to, and approval of, this will as to amount to a republication of it, for anything that I am prepared to say to the contrary. But, however this be, her repeated and even solemn declarations, to which I have already adverted, if applicable to, are clearly a virtual republication of this will."

In Long *v.* Aldred (3 Addams' Ecc. Rep., 48) the will was executed by a widow April 12, 1813. She afterwards married and her husband died June 15, 1819. She died June 9, 1820. In March, 1820, while ill in her room, she directed the nurse to bring her a mahogany box, in which she kept her papers, for the purpose of taking from the box her marriage bond, and, while looking over the papers, said: "Nurse, this is my will." The nurse, noticing the condition of the paper, remarked that it was "rat-eaten and couldn't be read." The testatrix said, "the roaches have done it," and started to read the paper, saying she had been asked to change the will but that she had no desire to do so. Some one coming in at the time, she desisted from further reading and said nothing more about the paper. As to the above averments, set forth in the petition which offered the paper for probate, the Court says, page 52:

"The facts and circumstances pleaded in the third and fourth articles of the allegation, would, if proved, clearly

amount to a republication of the will so far as respected her *personal* estate."

The allegations were thereupon (as stated in a note to the case) admitted to proof, and, being proved, the will was admitted to probate.

The case of Bateman *v.* Pennington (3 Moore's Privy Council Cases, 223) will also show the propriety of receiving parol testimony to the point of ascertaining the intent of the testator with reference to the paper. In that case the body of the paper (in the handwriting of the testator) was written in ink, but the date was inserted in pencil and the signature of the testator was likewise in pencil, preceded by the following words, also in pencil: "In case of accident I sign this my will."

There was also a clause of attestation, but without the subscription of any witnesses. The proponents of the paper had averred the intention of the decedent to die testate, and also his sudden death, but the lower court had refused proof, regarding the words of the paper as deliberative only, and not final, that being the presumption afforded by the condition of the instrument itself. The court, speaking by Lord Brougham, page 228:

"Their Lordships are of opinion that the sentence of the court below, rejecting the allegation, ought to be reversed, and that the appellant must be admitted to his proofs."

In the case of Strauss *v.* Schmidt (3 Phillimore's Ecc. Rep., 209) the testator had written a couple of letters telling how he wished his property to go "in case I should die on my travels." He returned from the continent and lived in England several years before his death. One of the letters had been delivered sealed to his bankers with direction to open as soon as they should hear of his death. The letters were propounded for probate in an allegation that they contained

the last will of the deceased. The question was as to whether the decedent had so recognized the papers after his return from traveling as to establish their testamentary effect, despite their conditional terms. The Court says, page 216:

"The deceased was a German, who had resided fourteen years in England. * * * He was not only a foreigner, but he was ignorant of our laws. His expressions, therefore, are not to be construed too strictly. The court is to look as much as possible to the intention. * * * These two papers together are admitted to be testamentary papers, which would have operated had his death taken place during his absence from England. He was fourteen years absent.

"Courts, however, are cautious how they construe conditions of this sort. * * * If, on the return of the deceased in 1802, by subsequent acts he has recognized these papers, I should not hold his return to be such a defeasance as to invalidate the will. If he had returned, and taken no notice of the paper, his silence would have put a construction on it. If, on the other hand, his conduct shows that he was mindful of it, the court is bound to carry his intentions into effect. * * * This is a direct recognition of the existence of a letter which was not to be opened till after his death; he goes on recognizing this direction; he keeps the disposition alive. * * * I think the deceased did not consider his return to this country as a revocation. These circumstances show that he regarded these letters as important—which were to direct the disposition of his property—and, therefore, I think the court is warranted in admitting this allegation to proof."

When statutes prescribe the manner in which wills shall be authenticated or republished (and the statutory formalities required for such writings have come within recent years to be in most places the same for both real and personal property), they have the effect of crystallizing the piece of writing, rendering it rigid and impervious, not to be affected by subsequent parol testimony. Under such statutes, the probative or testamentary character of the paper is fixed by

the act of execution, and parol testimony becomes inadmissible to affect such character, if inconsistent with what the statute requires as necessary to create the testamentary character. Under such statutes, if the will be conditional, the act necessary to revive or republish it after failure of the condition, must be such, of course, as the statute has prescribed for that purpose, generally the same as for an original publication. We need to consider the statute law which affected the case when we read decisions in which the court declined to receive subsequent parol declarations to the point of the testamentary character of the paper.

The will in the case of Parsons *v.* Lanoe, 1 Vesey, Sr., 190 (a case upon which the court below in its opinion, Rec., pp. 12–13, seems to lay stress as a leading case), was considered by Lord Hardwicke with reference to real estate between which and personal property there was at that time, as to wills, a wide difference in the state of the law, and that difference continued in England until 1837.

The case of Roberts *v.* Roberts, 8 Jurist, N. S., 220, is an illustration of the change made by statute in the law as it touches personal property. In Roberts *v.* Roberts, it was held that the paper, conditional in terms, could not be made operative by parol declarations of the deceased after his return from Wales, but that a revival must be in accordance with the provisions of the statute 1 Vict., c. 26. The Court says, page 221:

"There was evidence of adherence, but Mr. Pritchard (the counsel opposing probate) contended that such evidence could not be admitted, since the statute 1 Vict., c. 26, to establish the will. It appears to me his argument is well founded. The act of preserving the will can not carry the case further than a parol declaration concerning it; but, if the will in terms is conditional, the deceased could not by any parol declaration alter it. All the cases cited were decided before the statute 1 Vict., c. 26. In principle it is like

the case of a will made by a married woman without the consent of the husband. Before the statute such a will might be established by a parol recognition after the husband's death, for it was considered a republication, but no such operation can be given to it now. In Parsons *v.* Lanoe, Lord Hardwicke said, 'The penning of the will being so (*i. e.*, conditional), collateral or parol proof cannot be taken into consideration, for that would be dangerous, and what the court, since the Statute of Frauds, is not warranted to do; for nothing will set it up but some act done by him after that event to republish the will or defeat the condition.' In that case the question arose under the Statute of Frauds in relation to real estate; but since the statute 1 Vict., c. 26, the same principles are applicable to wills of personal property. For these reasons I feel bound to pronounce against the document propounded."

It is thus observable that the principle of the judgment in Parsons *v.* Lanoe did not apply to a will of personal property until the two kinds of property, real and personal, were put upon a parity, as to wills, by the statute of 1837 (1 Vict., c. 26). Indeed, as showing the tendency of the courts, even when statutes have supervened, to give effect to a testator's intention, despite the use by him of unfortunate phrases that would seem to import a condition defeative of the will, see the case of the Goods of Mayd, Law Reports, 6 Probate Division, page 17, decided in 1880. The paper in that case was the following:

"EULBERTIE STATION, COOPER'S CREEK,

"QUEENSLAND, 23d *August*, 1878.

"On leaving this station for Thargomindah and Melbourne, *in case of my death on the way*, know all men this is a memorandum of my last will and testament," (setting forth the bequests) and the paper was duly executed as a will. The court, page 18:

"The meaning of general phrases of this kind is, 'knowing the uncertainty of human life, and being about to enter on something particularly dangerous, I make this my will,'

and the court ought not to scrutinize such expressions with too great nicety."

When statutes have not intervened to put wills, as affecting personal property, upon a different footing than they occupied in the District of Columbia prior to January 1, 1902, parol or extrinsic evidence is receivable, either for the purpose of showing a republication of the will, or for the purpose of showing the *testamentary character* of the paper. The plaintiff in error does not want to change, vary, add to, or contradict, in any respect, the will of the decedent. He simply avers himself ready to show, by parol testimony if need be, that the paper he propounded for probate is the last will and testament of Caroline Holley. Did Caroline Holley make and cherish that paper as an unconditional declaration of her "last request"? When the thing under consideration is the *probative character* of the paper (not its testamentary construction) how can we better get at the mind and attitude of the testator—the testamentary mind and intent—than by a resort to evidence extrinsic to the paper itself?

The question, under this aspect of the case, is, not what this, the last will of Caroline Holley, *means*, but is this the *last will* of Caroline Holley? Did she intend this paper to set forth her "last request"? To ask such questions is to show the propriety of getting back to Caroline Holley and ascertaining what her idea was and whether she intended this paper to hang upon the contingency of her dying at a particular time.

As to the fourth error assigned: It can hardly be the law that a person who would bring to the attention of the court a paper of the character of the one under consideration must do so at his personal peril. Mrs. Holley had the right to leave her own "hard earnings," as she calls them, to whom she pleased; and, if she left a paper telling her pleasure in that

regard, it is the function of the law to see that her wishes are carried out. And surely the person who, in the utmost good faith, tenders to the court a paper which he thinks embodies the "last request" of the old lady is not to be amerced as for a false clamor, even if the court should feel itself obliged to say that Mrs. Holley was so unfortunate as not to have expressed her "last request" in legal form—neither the paper itself nor the paper as supplemented by her oral statements being sufficient to give effect to her intentions. Under such circumstances the expense of inquiring as to the sufficiency of her words in law to make known her wishes ought of course to come out of the property left by her, held by the court pending inquiry as to the legal owner.

Indeed, the Court of Appeals of the District, in Tuohy v. Hanlon, 18 D. C. App., 225—a case in which an executor for defending a will was allowed out of the estate even his reasonable counsel fees, though his defense of the will was unsuccessful against the caveat—said, page 232:

"It may be questioned whether he (the party named in the will as executor) can, of his own accord, and without the permission of the court, turn back after he has filed his petition. Nor is it apparent how any good purpose could be subserved if he then turned back. The will is then in court; it has been propounded for probate; it must be disposed of in some way before any letters of administration are granted to any one. The withdrawal of the executor named could only result in the appointment of some one else to conduct the contest."

The plaintiff in error in this case, being the residuary legatee under the paper offered for probate, stood in exactly the same situation, under the law, as though he had been named executor in the paper. The statute in force at the time the paper was filed for probate was the following (Sec. 63 of Abert's Comp., page 16):

"If letters of administration are to be granted, with a copy of the will annexed, and there be a residuary legatee or legatees in such will, he, she, or they shall be preferred to all, except a widow, and it shall be incumbent on the court to proceed, in the manner hereinbefore directed with respect to executors within the District, before administration shall be granted to any other person."

It was the duty, as well as the right, of La Fayette B. Eaton, the appellant and plaintiff in error in this court, acting in good faith, to present to the court below the paper which has been put in contest and to act in like manner as if he had been named executor, and it was error in the court below to tax him personally with the costs of the contest. No application to the court below for counsel fees out of the estate was made by the proponent of the paper.

It is probable that no one (in the face of Ormsby *v.* Webb, 134 U. S., 47; Campbell *v.* Porter, 162 U. S., 478; and Kenaday *v.* Sinnott, 179 U. S., 606) would question a writ of error as the proper proceeding on which to bring before this court for review a judgment of the Court of Appeals of the District of Columbia in a matter involving the probate of a will; but, through abundance of caution, the plaintiff in error herein prayed for and was allowed an appeal in this cause along with the writ of error (Rec., pp. 16–18).

J. ALTHEUS JOHNSON,
JOSEPH A. BURKART,
For the Appellant and Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 171.

LAFAYETTE B. EATON, APPELLANT AND PLAINTIFF IN ERROR,

vs.

HARRISON H. BROWN AND IRA DORRANCE, APPELLEES.

APPELLEES' BRIEF.

Error and appeal from a decree of the Court of Appeals of the District of Columbia refusing probate and record to a paper writing propounded by appellant as the last will and testament of one Caroline Holley, deceased.

Facts.

On December 23, 1901, appellant filed with the Register of Wills of the District of Columbia a certain paper writing purporting to be the last will and testament of one Caroline Holley. This instrument in full is as follows:

"WASHINGTON, D. C., *Aug. 31, 1901.*

"I am going on a journey and may, not ever return. And if I do not, this is my last request. The

mortgage on the King House, which is in the possession of Mr. H. H. Brown to go to the Methodist Church at Bloomingburgh. All the rest of my property both real and personal to my adopted son L. B. Eaton of the Life Saving Service, Treasury Department, Washington, D. C. All I have is my one hard earnings and I propose to leave it to whome I please.

"CAROLINE HOLLEY."

On February 10, 1902, he filed an amended petition in the Supreme Court of the District of Columbia, then holding a special term for Orphans' Court business, praying for the admission to probate of the aforesaid writing and for letters of administration *cum testamento annexo* (Transcript of Record, pp. 1–3).

On February 4, 1902, the appellee, Ira Dorrance, had filed a *caveat* stating his grounds of objection to the said will (Trans. pp. 4 and 5). Subsequently the appellee, H. H. Brown, filed his answer to the petition.

The cause came on for hearing on April 25, 1902, and the only facts proved, or attempted to be proved, were those contained in the stipulation of the parties at page 7, being as follows:

"1. That the paper writing filed as said will is in the handwriting of the deceased, and that it was signed by her on the 31st day of August, 1901.

"2. On the first day of September she took a journey to the Buffalo Exposition, through Canada, back through the Adirondacks, and then to Washington, D. C., where she resumed her occupation as clerk in the Treasury Department, and died December 17, 1901, at Washington, D. C."

On May 21, 1902, judgment was entered refusing the probate and dismissing the petition. From this decree appellant appealed to the Court of Appeals of the District of Columbia (Trans. p. 7). This appeal was argued on October

14, 1902, and on November 4, 1902, the decree of the Supreme Court was affirmed, Mr. Justice Morris writing the opinion, which is found at pages 9–15 of the transcript.

The facts that can be used in argument on this appeal are limited to those above recited, no others appearing in the record.

The principal assignment of error involves the question whether the words used in the will formulated a condition, and the only condition, under which the writing could become valid and effectual as a testamentary disposition.

POINT I.

It Appears Plainly That Testatrix Intended the Disposition of Her Property to Become Effectual Only in Case of the Happening of the Contingency Specified in the Will.

Parsons *vs.* Lanoe, 1 Ves. Sr. 190, and Ambler, 557.
Sinclair *vs.* None, 6 Ves. Jr. 607.
Estate of Winn, 2 Sw. & Tr. 47.
Roberts *vs.* Roberts, 8 Jur. N. S. 220.
Matter of Porter, L. R. 2 P. & D. 22.
In re Robinson, L. R. 2 P. & D. 171.
Lindsay *vs.* Lindsay, L. R. 2 P. & D. 449.
In re Ward, 4 Hagg. 179.
In re Todd, 2 W. & S. (Pa.) 145.
Morrow's Appeal, 116 Pa. 440.
Wagner *vs.* McDonald, 2 Har. & J. 346.
Maxwell *vs.* Maxwell, 3 Met. (Ky.) 101.
Daugherty *vs.* Daugherty, 4 Met. (Ky.) 25.
Robnett *vs.* Ashlock, 49 Mo. 171.
McGee *vs.* McNeill, 41 Miss. 17.

The language used by the respective testators in the cases above cited is strikingly similar to that used by testatrix in the case under consideration.

In Parsons *vs.* Lanoe, the leading case upon the subject, the words used are:

> "In case I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland."

We call the attention of the court particularly to the language construed in the following cases to render the will contingent:

> "If I never get back home I leave you everything in the world."
>
> Maxwell *vs.* Maxwell.

> "On anything happening that I should not return alive."
>
> Daugherty *vs.* Daugherty.

> "Should I never return I also desire."
>
> Massey *vs.* Griffin.

The foregoing three being Kentucky cases.

> "I this day start for Kentucky and may never get back. If it should be my misfortune I give my property," etc.
>
> Robnett *vs.* Ashlock (Mo.).

> "I am going to town with my drill and in case I should not get back do as I say on this paper."
>
> Morrow's Appeal (Pa.).

> "If I never get back to you I want all I have to be yours."
>
> McGee *vs.* McNeill (Miss.).

The object, in all cases in which the construction of a will is in question, is to arrive at the intent of the testator as therein expressed. In construing this will the only ques-

tion is, was the language importing the contingency intended by the testatrix to control the testamentary disposition, or was it used by her merely as a statement of circumstances existing at the time, which induced her to execute the will.

Subsequently we present a brief analysis of the authorities submitted by appellant and show that the language used by the testator in each case was plainly either susceptible of two constructions, or clearly showed that the testator was merely describing the circumstances influencing him to execute the will at that particular time (see Point II, *infra*).

We have yet to discover a case in which terms absolutely stating a contingency have been interpreted in any way except according to the plain meaning of the words used.

Judge Earl, of the Court of Appeals of New York, in the case of Ketaltas *vs.* Ketaltas, 72 N. Y. 312, expresses the rule for construction in probably as concise language as it is stated anywhere:

> "The primary object in construing wills is to ascertain the intention of the testator, and when that has been ascertained it is to be implicitly obeyed, however informal the language in which such intention has been conveyed. *But the intention is not matter of speculation or arbitrary conjecture. It is sought for in the language used;* and when language or a certain collocation of words has once received judicial construction precedents are formed which are followed in later cases. It is a general rule of construction that when a testator uses technical words he is presumed to employ them in their legal sense, and that *words in general are to be taken in their ordinary and grammatical sense, unless the context clearly indicates the contrary.*"

Applying that rule of construction to the present case, if the language used is not intended to describe a contingency which must have happened to make the will effectual, what other or stronger terms could the testatrix have used in order to express such testamentary intent. As Mr. Justice Morris says in the opinion :

> "If the words used in it as a preamble do not constitute a condition upon which the document is to become effective, we find it impossible to say what words could have been used for the purpose. . . . *Language could not well be plainer than this.*"

The words used in this case having an obvious and well-recognized meaning, and there being nothing in the context to imply that the testatrix intended to use the words with any but the ordinary force, the will becomes amenable to the following well-established rule of construction:

> "Words and limitations may be transposed, supplied or rejected where warranted by the immediate context, or the general scheme of the will; *but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument.*"
>
> 3 Jarman on Wills, 708, Rule XIX.

POINT II.

The Cases Cited by Appellant are Inapplicable to the Case at Bar.

In Bradford *vs.* Bradford, 4 Ky. L. R. 947, the language used was:

> "Being . . . about to start upon a long journey . . . I deem it prudent to provide for the disposition of my property in case I should not return."

In Cody *vs.* Conley, 27 Gratt. 313:

> "I am going away. I may never return. I leave my property," etc.

In In re Thorne, 4 Sw. & Tr. 36:

> "I request in the event of my death while serving in this horrid climate or any sudden happening to me, I leave and bequeath to my beloved wife,"

etc. . . . "I consider that every person should be prepared for the worst and particularly in such a treacherous climate as this."

In Ex parte Lindsay, 2 Bradford, N. Y. 204:

"According to my present intention should anything happen to me before I reach my friends in St. Louis, I wish to make a correct disposition," etc.

It appears on the face of all of the above cases that the recital of facts is merely intended by the testator to describe the motive which he had at the time for the execution of the will. Possibly the case most in appellant's favor is Ex parte Lindsay. But the words used in that case plainly import:

"I wish to make a correct disposition of my property in case anything should happen to me before I reach my friends in St. Louis."

Appellant also cites the following cases:

"Likefield *vs.* Likefield (82 Ky. 589): If any accident should happen to me that I die from home my wife Julia Ann Likefield shall have everything I possess."

"French *vs.* French (14 W. Va. 459): Let all men know hereby if I get drowned this morning . . . that I bequeath all my property personal and real to my beloved wife."

"In re Dobson (1 P. & D. 88): In case of any fatal accident happening to me being about to travel by railway I hereby leave all of my property to," etc.

"Skipworth *vs.* Cabell (19 Gratt. 75–78): In case of a sudden and unexpected death I give the remainder of my property," etc.

These cases are not at all similar to the case at bar. They can be clearly distinguished by the fact that in each the instrument is clearly made as a final testamentary disposition. As Mr. Justice Morris says in his opinion:

> "The cases of Likefield *vs.* Likefield and French *vs.* French were cases in which the wills were made by husbands in favor of their wives, and the disposition which they would probably have made of their respective estates in any event; and it is evident in both cases that the testator contemplated the propriety of making wills in view of the possible nearness of death, and did not intend the testamentary disposition to be specifically contingent upon the issue of the journeys upon which they were at the time about to enter."

In the present case, as Mr. Justice Morris very aptly remarks, there is no reference, specific or otherwise, to the death of the testatrix, and there is nothing in the terms of the will to support or furnish ground for a belief that the testatrix intended the will as anything more than a disposition of her property to take effect only in case she did not return from the journey she anticipated taking, and that she may have intended, in case she did return, to make some other disposition of her estate. As a matter of fact, she may after her return have made some different disposition. It is certain that no evidence was introduced showing in any way a republication of the will, nor from which an intent to republish can be presumed.

We respectfully submit that the construction of this will desired by appellant would not only be against the weight of previous decisions in parallel cases in this country and in England, but would do violence to the plain intention of the testatrix expressed in unequivocal language; and would practically have the effect as a precedent of making the execution of a contingent will an impossibility.

POINT III.

The Court of Appeals Ruled Correctly as to the Second Assignment of Error Therein.

We fail to see how the appellant came to introduce this question into the previous appeal, as no testimony was

offered in support of the allegations of the petition, and there was nothing before the court except the facts embraced in the stipulation in the case. There being nothing in the record to show that the question was raised in the court below or decided by it, there is nothing upon which to predicate an assignment of error.

POINT IV.

The Matter of Costs Was Properly Disposed Of.

The third assignment of error to the Court of Appeals was based upon the adjudication of costs, and the reasons cited in the opinion of Mr. Justice Morris, at page 15 of the record, were sufficient to warrant the disposition of the matter made by that court.

POINT V.

The Decree Appealed From Should be Affirmed, and the Writ of Error Dismissed With Costs to the Appellees.

THOMAS WATTS,
Attorney for Appellees.

Supreme Court of the United States.

No. 171.—October Term, 1903.

Lafayette B. Eaton, Appellant and Plaintiff in Error, *vs.* Harrison H. Brown and Ira Dorrance.	Appeal from and in error to the Court of Appeals of the District of Columbia.

[March 14, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

The question in this case is whether the following instrument is entitled to probate:

Washington, D. C. Aug. 31″/001.

I am going on a Journey and may, not ever return. And if I do not, this is my last request. The Mortgage on the King House, wich is in the possession of Mr H H Brown to go to the Methodist Church at Bloomingburgh All the rest of my properday both real and personal to My adopted Son L. B. Eaton of the life Saving Service, Treasury Department Washington D. C, All I have is my one hard earnings and and I propose to leave it to whome I please. Caroline Holley.

The case was heard on the petition, an answer denying the allegations of the same, except on a point here immaterial, and setting up that the residence of the deceased was in New York, and upon a stipulation that the instrument was written and signed by the deceased on August 31, 1901, and that she went on her journey, returned to Washington, resumed her occupation there as a clerk in the Treasury Department, and died there on December 17, 1901. Probate was denied by the Supreme Court with costs against the appellant, and this decree was affirmed by the Court of Appeals upon the ground that the will was conditioned upon an event which did not come to pass. It will be noticed that the domicil of the testatrix in Washington was not admitted in terms. But the Court of Appeals assumed the allegation of the petition that she was domiciled in Washington to be true, and obviously it must have been understood not to be disputed. The argument for the appellee does not mention the point. The petition also sets up certain subsequent declarations of the deceased as amounting to a republication of the will after the alleged failure of condition, but as these are denied by the answer they do not come into consideration here.

It might be argued that logically the only question upon the probate was the *factum* of the instrument. *Pohlman* v. *Untzellman*, 2 Lee, Eccl. 319, 320. But the practice is well settled to deny probate if it clearly appears from the contents of the instrument, coupled with the admitted facts, that it is inoperative in the event which has happened. *Parsons* v. *Lanoe*, 1 Ves. Sr. 189, *S. C.*, Ambler 557, 1 Wils. 243; *Sinclair* v. *Hone*, 6 Ves. 607, 610; *Roberts* v. *Roberts*, 2 Sw. & Tr. 337; *Lindsay* v. *Lindsay*, L. R. 2 P. & D. 459; *Todd's Will*, 2 W. & S. 145. The only question therefore is whether the instrument is void because of the return of the deceased from her contemplated journey. As to this, it cannot be disputed that grammatically and literally the words "if I do not" [return] are the condition of the whole "last request." There is no doubt either of the danger in going beyond the literal and grammatical meaning of the words. The English courts are especially and wisely careful not to substitute a lively imagination of what a testatrix would have said if her attention had been directed to a particular point for what she has said in fact. On the other hand, to a certain extent, not to be exactly defined, but depending on judgment and tact, the primary import of isolated words may be held to be modified and controlled by the dominant intention to be gathered from the instrument as a whole. Bearing these opposing considerations in mind, the Court is of opinion that the will should be admitted to proof.

"Courts do not incline to regard a will as conditional when it can be reasonably held that the testator was merely expressing his inducement to make it, however inaccurate his use of language might be, if strictly construed." *Damon* v. *Damon*, 8 Allen, 192, 197. Lord Penzance puts the same proposition perhaps even more strongly in *In the Goods of Porter*, L. R. 2 P. & D. 22, 23; and it is almost a common place. In the case at bar we have an illiterate woman writing her own will. Obviously the first sentence, "I am going on a journey and may not ever return," expresses the fact which was on her mind as the occasion and inducement for writing it. If that had been the only reference to the journey the sentence would have had no further meaning. *Cody* v. *Conly*, 27 Gratt. 313. But with that thought before her, it was natural to an uneducated mind to express the general contingency of death in the concrete form in which just then it was presented to her imagination. She was thinking of the possibility of death or she would not have made a will. But that possibility at that moment took the specific shape of not returning from her journey, and so she wrote "if I do not return," before giving her last commands. We need not consider whether if the will had nothing to qualify these words, it would be impossible to get away from the condition. But the two gifts are both of a kind that indicates an abiding and unconditioned intent—one to a

church, the other to a person whom she called her adopted son. The unlikelihood of such a condition being attached to such gifts may be considered. *Skipwith* v. *Cabell*, 19 Gratt. 758, 783. And then she goes on to say that all that she has is her own hard earnings and that she proposes to leave it to whom she pleases. This last sentence of self-justification evidently is correlated to and imports an unqualified disposition of property, not a disposition having reference to a special state of facts by which alone it is justified and to which it is confined. If her failure to return from the journey had been the condition of her bounty, an hypothesis which is to the last degree improbable in the absence of explanation, it is not to be believed that when she came to explain her will she would not have explained it with reference to the extraordinary contingency upon which she made it depend instead of going on to give a reason which on the face of it has reference to an unconditioned gift.

It is to be noticed that in the leading case cited for the opposite conclusion from that which we reach, *Parsons* v. *Lanoe*, Lord Hardwicke emphasises the proposition that under the circumstances of that case no Court of Equity would give any latitude to support such a will. There the will began "in case I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland." The testator then was married but had no children. He afterwards returned from Ireland and had several children. If the will stood the children would be disinherited, and that was the circumstance which led the Lord Chancellor to say what we have mentioned, and to add that courts would take hold of any words they could to make the will conditional and contingent. Ambler, 561; 1 Ves. Sr. 192. It is to be noticed further that in the more important of the other cases relied on by the appellees the language or circumstances confirmed the absoluteness of the condition. For instance, "my wish, desire, and intention, now is that if I should not return, (which I will, no preventing Providence"). *Todd's Will*, 1 W. & S. 145. There the language in the clearest way showed the alternative of returning to have been present to the testator's mind when the condition was written, and the will was limited further by the word "now." Somewhat similar was *In the Goods of Porter*, L. R. 2 P. & D. 22, where Lord Penzance said, if we correctly understand him, that if the only words adverse to the will had been "should anything unfortunately happen to me while abroad," he would not have held the will conditional. See *In the Goods of Mayd*, 6 P. D. 17, 19.

On the other hand, we may cite the following cases as strongly favoring the view which we adopt. It hardly is worth while to state them at length, as each case must stand so much on its own circumstances and words. The latest English decisions which we have seen qualify the tendency of

some of the earlier ones. *In the Goods of Mayd*, 6 P. D. 17; *In the Goods of Dobson*, L. R. 1 P. & D. 88; *In the Goods of Thorne*, 4 Sw. & Tr. 36; *Likefield* v. *Likefield*, 82 Ky. 589; *Bradford* v. *Bradford*, 4 Ky. Law Rep. 947; *Skipwith* v. *Cabell*, 19 Gratt. 758, 782–784; *French* v. *French*, 14 W. Va. 458, 502.

Decree reversed.

True copy.

Test:

Clerk Supreme Court, U. S.